Filed 3/20/19 P. v. Felix CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAIRO PEREZ FELIX, Defendant and Appellant.	F076469 (Super. Ct. No. F17903338) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Timothy A. Kams, Judge.

Lindsay Sweet, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Detjen, Acting P.J., Smith, J. and DeSantos, J.

On August 31, 2017, in case No. F17903338 (case 1) a jury convicted appellant Jairo Perez Felix of first degree burglary (Pen. Code, §§ 459, 460, subd. (a)/count 1),[1] felony unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a)/count 2), and fraudulent possession of personal identifying information (§ 530.5, subd. (c)(1)/count 3), a misdemeanor. In a separate proceeding, Felix admitted an on-bail enhancement (§ 12022.1) and the court found true an allegation in count 1 that a person, not an accomplice, was present during the burglary (§ 667.5, subd. (c)(21)) and that by committing the offenses in case 1, Felix violated a grant of probation.

When he committed the offenses of which he was convicted in case 1, Felix was out on his own recognizance in case No. F17900697 (case 2), in which he was convicted of carrying a concealed dirk or dagger (§ 21310). He was also on probation in case No. 16901379 (case 3), in which he was convicted of resisting an executive officer by force (§ 69, subd. (a).)

On October 2, 2017, the court sentenced Felix in all three cases to an aggregate prison term of six years eight months. In case 1, the court imposed the midterm of four years on his burglary conviction, a concurrent two-year term on his vehicle theft conviction, time served on his misdemeanor fraudulent possession of personal identifying information conviction and a two-year on-bail enhancement. In case 2, the court imposed a consecutive eight-month term on his possession of a concealed dirk or dagger conviction. In case 3, it imposed a concurrent 16-month term on his resisting an executive officer conviction.

On appeal, Felix contends: (1) the court committed instructional error; (2) his sentence violates section 654's proscription against multiple punishment; and (3) his abstract of judgment contains a clerical error. Additionally, on October 29, 2018, this

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1 All further statutory references are to the Penal Code, unless otherwise indicated.

court sent the parties a letter allowing them to brief several issues relating to Felix's award of presentence custody credit. We find merit to Felix's first and third contentions and partial merit to his second contention. We also conclude the court erred in its award of presentence custody credit.

FACTS

On February 15, 2017, after hearing some noise in the garage, Rosalin Nalbandian and a friend went to check and found Felix using a leaf blower to blow dust and dirt from the garage's ceiling. Nalbandian yelled at Felix, but he did not stop until her friend unplugged the blower. Felix then said something to Nalbandian that she did not understand. Nalbandian called the sheriff's department.

A sheriff's sergeant, who responded in a helicopter, saw Felix pushing a motorcycle that was not operational from the garage to the end of the driveway. A deputy arrived on the scene and detained Felix as he walked away from Nalbandian's residence. The deputy searched Felix and found a car registration, a credit card, and a statuette that belonged to Nalbandian. Nalbandian's name had been scratched off the registration and another name had been written on top.

The motorcycle was located 25 yards away from the garage behind a tree. An ice chest that contained beer, wine, and cider was next to the motorcycle. Nalbandian identified Felix as the man she had seen in her garage.

DISCUSSION

The Alleged Instructional Error

The court charged the jury as follows with respect to the vehicle theft offense:

> "To prove that the defendant is guilty of this crime, the People must prove that: [¶] (1) The defendant took or drove someone else's vehicle without the owner's consent; [¶] [and] [¶] (2) When the defendant did so, [he] intended to deprive the owner of possession or ownership of the vehicle for *any period of time*. [¶] … A *taking* requires that the vehicle be

> moved for any distance, no matter how small. [¶] … A vehicle includes a [motorcycle]." (First italics added.)

Felix contends that because the taking of Nalbandian's motorcycle involved a theft, and not a driving, to convict him of felony vehicle theft the jury had to find he intended to permanently deprive the owner of possession and that the value of the motorcycle exceeded $950. Thus, according to Felix, the court prejudicially erred because (1) it instructed the jury that to convict him of the charged felony vehicle theft offense, it had to find only that he intended to deprive the owner of possession for any period of time; and (2) it did not instruct the jury that the value of the motorcycle had to exceed $950. Respondent concedes that the court erred by not instructing on the value of the motorcycle and that this requires reversal of Felix's vehicle theft conviction, but she contends the matter should be remanded to allow the prosecutor the option of retrying that charge.

> " 'Unlawfully taking a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and the taking may be accomplished by driving the vehicle away. For this reason, a defendant convicted under [Vehicle Code] section 10851[,] [subdivision] (a) of unlawfully taking a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction. … On the other hand, unlawful driving of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete …. Therefore, a conviction under section 10851[,][subdivision] (a) for posttheft driving is not a theft conviction … .' [Citation.] The same is true when a defendant acted with intent only to deprive the owner *temporarily* of possession. Regardless of whether the defendant drove or took the vehicle, he did not commit auto theft if he lacked the intent to steal." [¶] … [¶] " 'As a result, … an offender who obtains a [vehicle] valued at less than $950 *by theft* must be charged with petty theft and may not be charged as a felon under any other criminal provision.' " (*People v. Page* (2017) 3 Cal.5th 1175, 1183.)

Since the motorcycle Felix took was not operable, his taking of the motorcycle involved a theft, not a driving. Thus, the court should have instructed the jury that to convict him of a felony violation of Vehicle Code, section 10851, subdivision (a) they

had to find that he took the motorcycle with the intent to permanently deprive the owner of possession and that its value exceeded $950. The court erred by its failure to instruct on these two elements.

The trial court must instruct sua sponte on all elements of a charged offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) The omission of one element or multiple elements from an instruction prevents the jury " 'from rendering a "complete verdict" on *every* element of the offense' [citation] and thus violates the accused's Sixth Amendment right to a jury as well as the 'inviolate right' to a jury under the California Constitution." (*People v. Mil* (2012) 53 Cal.4th 400, 411.) "Where the effect of the omission can be 'quantitatively assessed' in the context of the entire record (and does not otherwise qualify as structural error), the failure to instruct on one or more elements is mere ' "trial error" ' and thus amenable to harmless error review." (*Id*. at pp. 413-414.) "An instructional error involving multiple elements, like an error involving a single element, will be deemed harmless only in unusual circumstances, such as where each element was undisputed, the defense was not prevented from contesting any of the omitted elements, *and* overwhelming evidence supports the omitted element. (*Id*. at p. 414, italics added.)

Although it can reasonably be inferred from the evidence that Felix took the motorcycle with the intent to permanently deprive Nalbandian of possession, the prosecutor did not provide any evidence to prove that the value of the motorcycle exceeded $950. Therefore, the court's instructional error was not harmless because the record does not contain overwhelming evidence that supports one of the omitted elements and it is insufficient to sustain Felix's conviction for felony vehicle theft. Further, because the evidence was insufficient to sustain this conviction, allowing the prosecutor to retry the vehicle theft charge would violate double jeopardy principles. (Cf. *In re D.N.* (2018) 19 Cal.App.5th 898, 903-904.) Therefore, we will reduce Felix's vehicle theft

conviction to a misdemeanor without giving the prosecutor the option of retrying that charge.[2] (*Id*. at p. 904.)

The Section 654 Issue

Felix contends the terms imposed on his vehicle theft and fraudulent possession of personal identifying information convictions must be stayed pursuant to section 654 and the due process clause of the Fourteenth Amendment because the burglary was incident to and the means of committing both offenses. Respondent concedes section 654 requires that the term imposed on Felix's vehicle theft conviction be stayed, but not the term imposed on his fraudulent possession of personal identifying information conviction. We agree with respondent.

"As relevant, section 654, subdivision (a), provides: 'An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.' " (*People v. Jones* (2012) 54 Cal.4th 350, 353.)

Section 654 has been interpreted to prohibit multiple punishments for a single act or an indivisible course of conduct. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Ibid*.) "On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may

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[2] Although the insufficiency of the evidence provides an alternative basis for reducing Felix's conviction to a misdemeanor, we rely primarily on the instructional error because the parties briefed only that issue.

impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an otherwise indivisible course of conduct." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) Whether a course of conduct is indivisible depends on a defendant's intent and objective, not temporal proximity of the offenses. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.)

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) "It has long been established that the imposition of concurrent sentences is precluded by section 654 [citations] because the defendant is deemed to be subjected to the term of *both* sentences although they are served simultaneously." (*People v. Miller* (1977) 18 Cal.3d 873, 887.) Instead, the accepted "procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable." (*Id*. at p. 886.)

"The elements of first degree burglary in California are (1) entry into a structure currently being used for dwelling purposes and (2) with the intent to commit a theft or a felony." (*People v. Sample* (2011) 200 Cal.App.4th 1253, 1261.) "Under California law, theft requires an intent to *permanently* deprive another of property." (*People v. Avery* (2002) 27 Cal.4th 49, 52.)

It is clear from the record the jury found that Felix entered Nalbandian's garage with the intent to commit a theft and that, consistent with that intent, he took the disabled motorcycle he found there. Therefore, since the taking of the motorcycle was part of a continuous course of conduct and was also motivated by the intent to commit a theft, we

agree with the parties that the court was required to stay the term imposed on Felix's vehicle theft conviction.

Fraudulent possession of personal identifying information, however, requires an intent to defraud another person, not an intent to permanently deprive another of property (*People v. Truong* (2017) 10 Cal.App.5th 551, 561). "Defraud" means "to injure someone in their pecuniary or property rights." (*Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 394.) Although the car registration was taken during a continuous course of conduct, during which the burglary and theft of the motorcycle occurred, Felix had a separate, independent intent in taking the registration. Thus, the record supports the court's implicit determination that section 654 did not bar it from imposing a concurrent term on Felix's fraudulent possession of personal identifying information conviction.

The Abstract of Judgment

Felix contends that his conviction for resisting an executive officer is erroneously listed in section 1 of his abstract of judgment as a conviction for making criminal threats. We agree. Additionally, in section 2, the abstract erroneously cites section 12022.21, instead of section 12022.1, as the basis for the on-bail enhancement that was found true. We will direct the court to correct these errors.

Felix's Award of Presentence Custody Credit

Background

In case 3, Felix was in custody 106 days prior to February 1, 2017. From February 1, 2017, through February 7, 2017, Felix was in custody seven days in case 2 and case 3. From February 15, 2017, the date of his arrest in case 1, through October 2, 2017, the date he was sentenced, Felix was in custody 230 days in all three cases.

In case 1 and case 2, the court awarded Felix 272 days of presentence custody credit consisting of 237 days of presentence actual custody credit and, pursuant to

section 2933.1, 35 days of presentence conduct credit.[3] In case 3, the court awarded Felix 685 days of presentence custody credit consisting of 343 days of presentence actual custody credit and, pursuant to section 4019,[4] 342 days of presentence conduct credit.

In our letter to the parties, we allowed them to brief the following issues: (1) whether Felix was entitled to presentence custody credit in case 1 for his time in custody from February 1, 2017, through February 7, 2017; (2) whether Felix was entitled to duplicative credit in cases 2 and 3 for his time in custody during that period of time; (3) whether Felix was entitled to duplicative credit in cases 1 and 2 for his days in custody from February 15, 2017, through December 2, 2017; and (4) whether Felix's presentence custody credit in each case was limited to a maximum of 15 percent.

Felix concedes the court erred in its award of presentence custody credit in case 3 because it awarded him in excess of 15 percent conduct credit in that case. Additionally, he contends that the seven days noted above should be awarded against the term imposed in case 2.[5] We accept Felix's concession and we agree that the seven days he refers to should be credited to the term imposed in case 2. We also conclude that in case 1, Felix was not entitled to presentence custody credit for the time he spent in custody from February 1, 2017, through February 7, 2017, and that in case 2, he was not entitled to such credit for the time he spent in custody from February 15, 2017, through December 2, 2017.

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3 The court did not state in which case it awarded these presentence custody credits. However, Felix's abstract of judgment indicates that the court awarded them in case 1 and case 2. For purposes of our analysis, we assume the court awarded these presentence custody credits in each case.

4 When applicable, section 4019, subdivision (f) provides two for two presentence conduct credit.

5 Respondent filed a letter brief in which she agrees with this court's determination regarding the alleged errors in the calculation of Felix's presentence custody credit.

Felix Was Not Entitled to Presentence Custody Credit in Case 1 for His Time in Custody from February 1, 2017, through February 7, 2017

The court's award of 237 days of presentence actual custody credit in case 1 included seven days he was in custody in cases 2 and 3 from February 1, 2017, through February 7, 2017. However, since Felix was not in custody in case 1 on those days, he was not entitled to presentence custody credit for those days against the terms the court imposed in that case. (§ 2900.5, subd. (b) ["… credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted"].) Therefore, in case 1 Felix was entitled to only 230 days of presentence actual custody credit (237 days - 7 days = 230 days).

Felix Was Entitled to Duplicative Credit in Cases 2 and 3 for His Time in Custody from February 1, 2017, through February 7, 2017

Where a defendant is held in presentence custody on multiple charges and upon conviction is ordered to serve concurrent sentences, all days in custody must be credited to each of them. (*People v. Schuler* (1977) 76 Cal.App.3d 324, 330; *People v. Kunath* (2012) 203 Cal.App.4th 906, 911.) Since the court imposed a term on Felix's conviction in case 3 that was concurrent vis-à-vis the term it imposed in count 2, Felix was entitled to credit in case 2 for the seven days he spent in custody on those cases from February 1, 2017, through February 7, 2017, even though he also received credit for those days in case 3.

Felix Was Not Entitled to Presentence Custody Credit in Case 2 for His Days in Custody from February 15, 2017, through December 2, 2017

"Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed." (§ 2900.5, subd. (b).) In cases 1 and 2, the court awarded Felix 230 days of presentence actual custody credit for the days Felix was in custody from February 15, 2017, through the date of his sentencing on October 7, 2017. However, since the court awarded Felix credit for these days in

case 1 and it imposed a consecutive sentence in case 2, Felix was not entitled to duplicative credit for these days in case 2.[6]

Felix's Presentence Conduct Credit Was Limited to 15 Percent

Section 2933.1 in pertinent part provides:

> "(a) … any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933. [¶] … [¶] (c) Notwithstanding … any other provision of law, the maximum credit that may be earned against a period of confinement … following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a)."

Felix's first degree burglary conviction was a violent felony because the court found true an allegation that a person other than an accomplice was present during the burglary (§ 667.5, subd. (c)(21). He was thus limited to earning a maximum of 15 percent conduct credit for the 230 days he was in presentence actual custody in case 1. (§ 2933.1, subds. (a) & (c).) Moreover, because the section 2933.1 limitation applies to the offender (*People v. Ramos* (1996) 50 Cal.App.4th 810, 817), it applies to all of a defendant's convictions even though some are not violent felonies and even if the presentence custody for the nonviolent felonies occurred prior to the commission of the violent felony. (*People v. Nunez* (2008) 167 Cal.App.4th 761, 765; *People v. Marichalar* (2003) 144 Cal.App.4th 1331, 1337.)

Applying these principles to the case, we conclude that in case 1 Felix is entitled to only 34 days of presentence conduct credit (230 days x .15 days = 34.5 days) and a total of 264 days of presentence custody credit (230 days + 34 days = 264 days). In

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[6] However, Felix was entitled to duplicative credit for those 230 days against the term the court imposed in case 3 because the court imposed a concurrent term in that case. (*People v. Schuler*, *supra*, 76 Cal.App.3d at p. 330.)

case 2 Felix is entitled to only one day of presentence conduct credit (7 days x .15 = 1.05 days) and a total of eight days of presentence custody credit (7 days + 1 day = 8 days). In case 3 Felix is entitled to 343 days of presentence actual custody credit (106 days + 7 days + 230 days = 343 days), 51 days of presentence conduct credit (343 days x .15 = 51.45 days), and a total of 394 days of presentence custody credit (343 days + 51 days = 394 days).

DISPOSITION

Felix's vehicle theft conviction (Veh. Code, § 1081, subd. (a)) is reduced from a felony to a misdemeanor and the term imposed on that conviction is reduced to a one-year local term, which is stayed. The judgment is further modified to award Felix 264 days of presentence custody credit in case 1, consisting of 230 days of actual custody credit and 34 days of conduct credit; eight days of presentence custody credit in case 2, consisting of seven days of actual custody credit and one day of conduct credit; and 394 days of presentence custody credit in case 3, consisting of 343 days of actual custody credit and 51 days of conduct credit. The trial court is directed to issue an amended abstract of judgment that incorporates these modifications and which indicates that in case 3, Felix was convicted of resisting an executive officer by force (Pen. Code, § 69, subd. (a)) and that the on-bail enhancement imposed in case 1 was imposed pursuant to Penal Code section 12022.1. The court is further directed to send a certified copy of the amended abstract of judgment to the appropriate authorities. As modified, the judgment is affirmed.